No. 00-3643

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMERICAN AMUSEMENT MACHINE ASSOCIATION, et al,

Plaintiffs-Appellants,

v.

TERI KENDRICK, in her official capacity, et al,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana
(No. IP00-1321-C-H/G)

BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION SUPPORTING REVERSAL IN FAVOR OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Fundamental First Amendment principles often emerge from seemingly inconsequential disputes. This is such a case. While it may appear farfetched to some that a local regulation of electronic games could have a significant effect on the future of free expression, this case squarely presents two issues that will shape First Amendment jurisprudence for years to come: (1) the constitutional status of new interactive technologies, and (2) the government's ability to declare certain disfavored content categories to be unprotected speech. The district court below claimed to find that the First Amendment protects some video games, but as a practical matter, provided only minimal protection, if any. The court then took the unprecedented step of extending the "harm to minors" standard to include violent video games, and denied plaintiffs' motion for a preliminary injunction. The district court reached the wrong result and for the wrong reasons; its decision should be reversed.

STATEMENT OF AMICUS CURIAE

The Electronic Frontier Foundation

The Electronic Frontier Foundation ("EFF") is a non-profit, civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry and government to support free expression, privacy, and openness in the information society. Founded in 1990, EFF is based in San Francisco, with a satellite office in Washington, DC. EFF has members all over

the United States and maintains one of the most-linked-to Web sites (http://www.eff.org) in the world.

EFF's Interest in this Case

EFF believes that free speech is a fundamental human right, that free expression is vital to society. The vast web of electronic media that now connects us is heralding a new age of communications, a new way to convey speech. New digital networks offer a tremendous potential to empower individuals in an ever over-powering world. While EFF is mindful of the serious issues that may arise when information flows free, EFF is dedicated to addressing such matters constructively while ensuring that fundamental rights are protected.

Thus, EFF's interest in this case. The district court's decision below unnecessarily infringes on the freedom of speech and, thus, reaches the wrong resolution of this matter. The inclusion of violence in the category of obscene speech -- and in the sub-category of speech that is harmful to minors -- represents an unprecedented and unwarranted expansion of the categorical approach to the First Amendment. Moreover, this expansion will severely impede the development of the upcoming digital society in ways unforeseen and not fully addressed by the parties or the court below. The district court's decision has far-reaching implications that would constrain the growth of these new technologies, to the detriment of all.

Authority to File

EFF has authority to file this brief pursuant to Rule 29(a), Fed. R. App. P., the parties having granted their consent.

Argument

By enacting Indianapolis General Ordinance No. 72-2000 ("the Ordinance") the City of Indianapolis has singled out certain arcade-based video games for regulation based on their content. *American Amusement Machine Ass'n v. Kendrick*, ___ F. Supp. 2d at ___, 2000 WL 1528687, *10 (S.D. Ind. Oct. 11, 2000) ("*American Amusement*"). Yet the district court declined to enjoin the Ordinance because it concluded that the expressive elements of those games are "inconsequential" and that the principles embodied in *Ginsberg v. New York*, 390 U.S. 629 (1968), may be extended outside the area of sexual speech to permit restrictions on minors' access to violent video games. *Id.* at *27-33. The court's resolution of these issues significantly undervalues both the expressive nature of interactive game technologies as well as the First Amendment cost of extending the categories of unprotected speech to include "violence." The court's ruling ignores the history of First Amendment jurisprudence in the United States as it relates to new communication technologies, and therefore fails to foresee the massive exception to First Amendment protections that follows from its reasoning.

I. The District Court Erred in Providing Minimal First Amendment Protection to Video Games in This Case

A. The Court's Incremental Approach to Protecting New Interactive Media is Erroneous

The district court's assessment of the level of constitutional protection to be accorded video games was based on the premise that "[e]ach medium must be assessed for First Amendment purposes by standards suited to it, for each may

present its own problems." *Id*. at *8, quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). This assumption, that each communications medium "is a law unto itself," *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring), suggests incorrectly that "the Constitution ha[s] to be reinvented with the birth of each new technology." 1/ A closer inspection of First Amendment jurisprudence, however, reveals that courts increasingly apply traditional First Amendment standards to new media. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). And even in those cases where the courts initially applied only diminished First Amendment protection to new forms of communication, full protection typically is extended to new media as society gains more experience with them. *E.g*., *United States v. Playboy Entertainment Group, Inc*., 120 S. Ct. 1878, 1886 (2000) (cable television); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503 (1952) (cinema). Here, the district court's decision to extend only limited First Amendment protection to the medium of interactive games was erroneous. 2/

1. The Court Gave No Force to its Own Finding That Video Games Are a Protected Form of Expression

At first blush, the District Court appeared to reject the assumptions of previous cases regarding the constitutional status of video games, as well as the City's argument below that "video games simply are not a form of expression

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1/ Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote Address at the First Conference on Computers, Freedom & Privacy (Mar. 26, 1991).

2/ *See generally* Zuckman, Corn-Revere, Frieden & Kennedy, MODERN COMMUNICATIONS LAW 177-281 (West Group, Inc. 1999).

protected under the First Amendment." *American Amusement* at *5-10. The court described the creative process involved in creating video games, which includes the creation of characters, story lines and themes, the use of "story boards" to depict action sequences, and the addition of sound and music. *Id*., at *4. The court noted that "[m]any of today's games include three-dimensional simulated environments and full motion video similar to the technology used in computer-animated feature films," and it concluded that "[i]t is difficult for First Amendment purposes to find a meaningful distinction between the Gauntlet game's ability to communicate a story line and that of a movie, television show, book, or – perhaps the best analogy – a comic book." 3/

But the lower court's apparent embrace of the expressive status of modern video games is illusory. For the court ultimately based the level of First Amendment protection it was willing to extend to this relatively new medium upon its finding that "the expressive elements of those games are . . . inconsequential – especially as compared to significant elements of protected expression present in books, television and movies." *American Amusement* at *34. In other words, the court agreed with the plaintiff that video games are expressive, just not very much so. The district court then applied a lower level of First Amendment scrutiny for all "violent" games, regardless of the extent to which they may convey a message. *See*

3/ *American Amusement* at *4-5, *9. "Gauntlet" is a series of action adventure video games of recent vintage that were described by the plaintiff below as evidence of the thematic nature of contemporary games. The City, on the other hand, characterized video games as "closely analogous to mechanical pinball machines or shooting galleries at a local fair." *Id*. at *7-8.

id. at *35 ("even if the violence in a video game is completely justified and shows the forces of good prevailing over the forces of evil in a fantastic battle, it is still regulated"). Accordingly, although it suggested otherwise, the court extended only the "barest minimum" of First Amendment protection to this medium, as if it were akin to nude barroom dancing. *See Doran v. Salem Inn*, 422 U.S. 922, 932 (1975).

In this respect, the district court's opinion applied in substance the holdings of the earlier cases that it purported to disavow. In a series of cases decided almost two decades ago, courts held that video games are not speech protected by the First Amendment because they provide only entertainment and not "information." *E.g., America's Best Family Showplace Corp. v. New York, Dept. of Bldgs.*, 536 F. Supp. 170, 173-174 (E.D.N.Y. 1982); *Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297 (D. Mass. 1983); *Tommy & Tina, Inc. v. Department of Consumer Affairs*, 459 N.Y.S.2d 220, 227 (N.Y. Sup. Ct.), *aff'd on other grounds*, 464 N.Y.S. 2d 132 (1983); *Kaye v. Planning & Zoning Comm'n.*, 472 A.2d 809 (Conn. Super. Ct. 1983); *Caswell v. Licensing Commission*, 444 N.E.2d 922 (Mass. 1983). These cases all involved zoning and licensing regulations of arcades – none analyzed the government's ability to regulate the content of video games.

In the first break with this line of cases, this Court (almost a decade later) expressed significant doubt about the conclusion that "all video games can be characterized as completely devoid of any first amendment protection." *Rothner v. Chicago*, 929 F.2d 297, 303 (7th Cir. 1991). The Court in *Rothner* was uncomfortable with resolving the First Amendment question in the context of a

motion to dismiss, since there was no record by which to determine "whether the video games at issue here are simply modern day pinball machines or whether they are more sophisticated presentations involving storyline and plot that convey to the user a significant artistic message protected by the first amendment." *Id*. It compared its situation with that facing the Supreme Court as it began to decide the First Amendment status of cable television, and said that "[t]o hold on this record that all video games – no matter what their content – are completely devoid of artistic value would require us to make an assumption entirely unsupported by the record and perhaps totally at odds with reality." *Id*.

Here, by sharp contrast with the situation in *Rothner*, the court below was not confronted with a barren record, but instead received submissions from both sides on the communicative nature of video games. From the plaintiff the court heard evidence that "today's games are highly interactive versions of movies and storybooks, replete with digital art, music, complex plots and character development." *American Amusement* at *7; *see id*. at *4-5. From the defendant the court saw a compilation video that demonstrated violent sequences from selected games. *Id*. at *9-10. After weighing the evidence, the district court found that "the visual art and the description of the action-adventure games in the record support plaintiffs' contention that at least some video games contain protected expression." *Id*. at *9.

But as it turned out, this conclusion was faint praise for the communicative nature of video games, because the court ultimately based its

parsimonious application of First Amendment protection on what it described as the "inconsequential" expressive elements of some games compared to other media. The paradigmatic example was a game called "The House of the Dead 2," in which the player adopts the persona of a character named "James" and attempts to save a town from a cadre of zombie-like creatures by shooting them. While the court found that some games may be constitutionally protected, it suggested that the speech elements of "The House of the Dead 2" were "perhaps . . . so inconsequential as to remove the game from the protection of the First Amendment." *Id*. at *9-10.

This conclusion – that the "message" of some games is insufficiently robust to merit much protection – is wrong factually and led the court to misapply the law. To describe the artistic or communicative elements of such games as inconsequential prompts the question, "as compared to what?" Certainly anyone familiar with the modern horror film genre would not suggest that this body of work contributes much to further the practice of deliberative democracy, 4/ yet such films are fully protected by the First Amendment. *American Booksellers Ass'n. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986); *Video*

4/ Compare, for example, the district court's description of "The House of the Dead 2" with any number of contemporary or even "classic" horror films. For example, the 1968 film "Night of the Living Dead" has been described as follows: "This gruesome low-budget horror film still packs a punch for those who like to be frightened out of their wits. It is an unrelenting shockfest laced with touches of black humor that deserves its cult status." The less celebrated film "Night of the Zombies" is summed up as "just one long cannibal feast." Mick Martin & Marsha Porter, VIDEO MOVIE GUIDE 1996 884 (1995). The court's assumption that there is no "meaningful distinction" between the communicative content of storybooks or films and games such as "Gauntlet," *American Amusement* at *9, but that there is a

Software Dealers Ass'n. v. Webster, 968 F.2d 684 (8th Cir. 1992). The same is true of role-playing games, like "Dungeons and Dragons." *Watters v. TSR, Inc.*, 904 F.2d 378, 382-383 (6th Cir. 1990). As Chief Judge Richard Posner has explained, to require the expression of ideas or opinions as a condition of constitutional protection would represent "a shocking contraction of the First Amendment as it has come to be understood," for it would exclude most music and visual art, along with much of literature. 5/

The district court's inapt assessment of the communicative nature of video games led it to apply only attenuated constitutional protection to this medium, evidently on the assumption that it should split the difference between those games that seem less "artistic" or "expressive" than others. But it does not follow that courts may provide less First Amendment protection for *all* video games because *some* do not "communicate" sufficiently. Such an approach is flatly contrary to the First Amendment overbreadth doctrine, which provides that the

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difference of constitutional dimension between movies and "The House of the Dead 2" is unsupported by reality.

5/ *Miller v. City of South Bend*, 904 F.2d 1081, 1096 (7th Cir. 1990) (en banc) (Posner, J., concurring), *rev'd. sub nom. Barnes v. Glen Threatre, Inc.*, 501 U.S. 560, 566 (1991). *See also id*. at 1091 (noting that art is protected by the First Amendment even though it expresses "an ordering of sights and sounds that arouses emotion" rather than ideas). The district court ignored these aspects of Judge Posner's concurring opinion in *Miller*, citing it instead for the proposition that video games fall in a "gray area" in which greater regulation may be permissible. *American Amusement* at *7. But the *Miller* concurring opinion, which included Judge Posner's brief speculative reference to video games, was issued almost a year before *Rothner*, where a panel that included Judge Posner wrote that it lacked sufficient evidence at that time to assess the constitutional status of video games. Such is not the case here.

government cannot enforce laws against unprotected speech if they are written so broadly as to encompass – and thereby chill – protected expression. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 129-130 (1992); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-214 (1975).

Here, the court even acknowledged that the more expressive the game, the more likely it is to be restricted by the Ordinance. Because it distinguishes between games based on their sexual and/or violent content, the Ordinance presumes the capacity of games to communicate messages, ideas or feelings. *American Amusement* at *10. Indeed, the very terms of the Ordinance trigger greater regulation to the extent a game is more artistic. *Id*. at *2 (application only to "realistic" games). But as the Supreme Court found recently, a law designed to protect young people from the presumed adverse effects of some specified subject matter "is the essence of content-based regulation" and is subject to strict scrutiny. *Playboy Entertainment Group*, 120 S. Ct. at 1885. *See also Hudnut*, 771 F.2d at 329-330 (presumed impact of disfavored speech is reason for its protection). The district court below failed to grasp this basic tenet of First Amendment law, and erroneously applied a diminished level of constitutional protection to video games *because* of their ability to communicate. 6/

6/ Nor does the district court gain any support from decisions that uphold local regulation of various forms of proscribable conduct. *Compare City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1396 (2000), *with Playboy Entertainment Group*, 120 S. Ct. at 1887 ("the lesser scrutiny afforded regulations targeting the secondary effects . . . has no application to content-based regulations targeting the primary effects of protected speech").

2. The District Court's Diminished Protection for Interactive Media is Indefensible.

If the Indianapolis Ordinance had sought to regulate children's access to books about violence, established law would have subjected the law to full First Amendment scrutiny. *Winters v. New York*, 333 U.S. 507, 510-11 (1948); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 531 (Tenn. 1993). The same would be true if it had sought to regulate children's access to violent films or videos. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 (1968); *Webster*, 968 F.2d 684. Yet despite assertions to the contrary, the district court below treated the interactive medium of video games quite differently from other more traditional forms of speech. 7/ This conflicts with the awareness by a growing number of courts that "the medium in which experience is encoded is irrelevant to its expressive character and social consequences" – and to the level of First Amendment protection it should receive. *Miller v. City of South Bend*, 904 F.2d at 1099 (Posner, J., concurring).

The district court's reticent application of First Amendment principles to this new medium echoes the incremental and inconsistent way in which courts historically treated new communications technologies before *Reno v. ACLU*, 521 U.S. at 870. *See generally* Zuckman, *et al.*, *supra* note 2 at 189-197. Zechariah

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7/ *Compare American Amusement* at *9 (noting First Amendment protection for the Internet, theatrical performances and town hall meetings, all of which are interactive), with *id.* at *43 (child does not have "a constitutional right to train to become a sniper at the local arcade"). The court's offhand and unsupported reference to "training" reveals its belief that video games are subject to more intensive regulation because they are interactive teaching machines.

Chafee observed sixty years ago that "when additional methods for spreading facts or ideas were introduced or greatly improved by modern inventions, writers and judges had not got into the habit of being solicitous about guarding their freedom." This led to censorship of the mail, the importation of foreign books, the stage, cinema and radio. Chafee, FREE SPEECH IN THE UNITED STATES 381 (Harvard Univ. Press 1941). According to Ithiel de Sola Pool, this problem has been compounded with the advent of newer electronic media:

> A long series of precedents, each based on the last and treating clumsy new technologies in their early forms as specialized business machines, has led to a scholastic set of distinctions that no longer correspond to reality. As new technologies have acquired the functions of the press, they have not acquired the rights of the press.

Pool, TECHNOLOGIES OF FREEDOM 250 (Harvard Univ. Press 1983).

In this respect, previous judicial treatment of video games (including by the district court below) is comparable to early decisions regarding film. As with the initial cases defining the constitutional status of arcade games, when the Supreme Court first considered the new and novel medium of moving pictures, it found, as a matter of "common sense," that cinema was not "speech" and thus was not protected by the First Amendment. *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 244 (1915). The Court said that the technology of film poses a special danger that "a prurient interest may be excited and appealed to," and noted that "there are some things which should not have pictoral representation in public places and to all audiences." *Id*. at 242. *Compare* Preamble to Indianapolis video

game Ordinance regarding the need to protect "minor children from influences that the parents find inappropriate or offensive *American Amusement* at *3.

Decades later, after cinema became a more established and accepted part of society, the Supreme Court began to extend to film some measure of the First Amendment protections accorded the traditional press. *Joseph Burstyn, Inc.*, 343 U.S. at 502-503 & n.13. But, like district court below, the Supreme Court noted that "[e]ach method [of communication] tends to present its own particular problems," and extended only limited First Amendment status to film. *Id*. at 503. Local censorship boards flourished during this period of diminished protection. *See, e.g*., *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961). *See id*. at 69-78 (Warren, C.J. dissenting) (providing detailed examples of film censorship and noting the "astonishing" extent "to which censorship has recently been used in this country"). And, like the current debate over video games, much of the dispute centered on whether "motion pictures may be treated differently from newspapers because many movies are produced essentially for purposes of entertainment." *Id*. at 76. Eventually, the courts elevated the constitutional status of film to be on par with that of the press. *See Freedman v. Maryland*, 380 U.S. 51, 58-61 (1965); *id*. at 62 n.1 (Douglas, J. concurring) ("the Chicago censorship system, upheld by the narrowest of margins in *Times Film Corp*. . . . could not survive under today's standards"); *New York v. Ferber*, 458 U.S. 747, 771 (1982) (describing film as one of the "traditional forms of expression such as books" that must be protected as "pure speech").

In short, the courts ultimately gave movies their constitutional due, but it took a long time for them to get there. The last film censorship board in America was not dismantled until 1993, almost eighty years after the Supreme Court first assessed cinema's constitutional status. *See* Elizabeth Kastor, *It's a Wrap: Dallas Kills Film Board*, WASHINGTON POST, Aug. 13, 1993 at D1. In the meantime, the incremental approach to First Amendment analysis exacted a heavy toll on freedom of expression. 8/

By following the analysis of the early film cases, the court below sets the stage to repeat the unfortunate history of censorship that followed in their wake. The adverse impact of freedom of expression is even greater in the current environment, as we are on the cusp of an explosion of new interactive media that combine electronic games with the ability to communicate online as well as to exhibit movies. *See, e.g.*, Michel Marriott, *Playstation 2 as Trojan Horse*, NEW YORK TIMES, October 26, 2000 (http://nytimes.com/2000/10/26/technology/26PLAY.html) (new console combines gaming function with Internet connectivity, DVD playback and computing capability, among other possibilities); Christopher Stern, *Sony's*

8/ Atlanta banned "Lost Boundaries," a film about a black physician and his family who "passed" for white on grounds that exhibition of the film would "adversely affect the peace, morals and good order" of the community; Ohio censors deleted scenes of orphans resorting to violence in the film "It Happened in Europe;" the Chicago licensing board banned newsreel films of Chicago policemen shooting at labor pickets and refused a license to exhibit the film "Anatomy of a Murder;" the New York film licensing board censored over five percent of the movies it reviewed. *See, e.g., Times Film Corp.*, 365 U.S. 43. *See id*. at 69-72 (Warren, C.J. dissenting). Such examples are just the tip of the iceberg. *See generally* Edward DeGrazia and Roger Newman, BANNED FILMS xviii, 177-381 (1982) (describing 122 representative examples of film censorship between 1908 and 1981).

Serious About Playstation 2, WASHINGTON POST, October 28, 2000 at E1 ("the company is positioning its new box, with its DVD player and CD-ROM drive, to become the very heart of the home entertainment center"); Richard Shim, *Sega's Got Game . . . on the Net*, ZDNET NEWS, October 27, 2000 (http://dailynews.yahoo.com/h/zd/20001027/tc/sega_s_got_game_on_the_net_1.html). One recent estimate suggests that TV and game consoles will account for half of all broadband reception devices by 2003, with 20 million set-top boxes and 16 million gaming consoles. *Broadband Content Will Become the Entertainment Messiah for TVs, Not PCs, According to Forrester Research*, October 30, 2000 (http://www.forrester.com/ER/Press/Release/0,1769,425,FF.html); COMMUNICATIONS DAILY, Nov. 2, 2000 at 8.

The City no doubt will maintain that it is only restricting arcade games, and is not seeking to regulate home game consoles, DVD players or Internet devices. But for purposes of First Amendment analysis, the district court's implicit application of attenuated constitutional protection for interactive media would foster such regulations. As described *infra*, there is no shortage of proposed restrictions that would be encouraged by the decision below. If and when such new restrictions are adopted, the district court's incremental reasoning will be of no assistance in resolving the inevitable First Amendment questions that arise from the widespread use of interactive, computer-based media.

Perhaps for that reason, courts since *Reno v. ACLU* have abandoned the outmoded cycle of first denying protection to a new medium, then providing

limited protection, and finally – years later – offering full First Amendment status. *See generally* Zuckman, *et al.*, *supra* note 2 at 196-197. Every court that has evaluated the interactive medium of the Internet has agreed from the outset to provide undiminished protection. 9/ Here, the district court has acknowledged that video games communicate. That, after all, is the reason for the regulation. *American Amusement* at *10 ("the City has singled out certain games for regulation based on their content"). Having made that finding, there is no justification for the court's dilution of First Amendment principles because of the method of communication.

B. The District Court's Expansion of the Categories of Unprotected Speech to Include Violent Video Games is Unprecedented and Unwarranted.

The district court's decision to expand the "harm to minors" standard to include violence represents the first expansion of unprotected categories of speech since the beginning of modern First Amendment jurisprudence. The logic of the decision opens a potentially vast exception to traditional protections for free expression, and it should be reversed.

1. The Expansion of "Variable Obscenity" is Unsupported by Either Precedent or Reason

Early First Amendment cases recognized what was then described as certain "well-defined and narrowly limited classes of speech" that were long

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9/ *See e.g.*, *Reno v. ACLU*, 521 U.S. at 868-870; *ACLU v. Reno*, 217 F.3d 162, 174-175 (3d Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149, 1156 (10th Cir. 1999); *PSINet v. Chapman*, 108 F.Supp. 2d 611 (W.D. Va. 2000); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 749 (E.D. Mich. 1999); *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd*, 521 U.S. 1113 (1997).

considered to be outside the First Amendment's protection. These categories included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words,'" *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) and commercial speech. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Since those early pronouncements, however, the clear trend has been toward greater constitutional protection of speech, to the extent that some scholars suggest that this categorical approach has "largely been discredited and abandoned." Rodney A. Smolla, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 2-67 (1997).

Commercial speech now receives First Amendment protection, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), as do "lewd," *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), "insulting," *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), and even "fighting words." *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Substantial constitutional protections buttress the freedom of speech alleged to be obscene, *Bantam Books v. Sullivan*, 372 U.S. 58, 65 (1963), or defamatory, because freedom of expression must have substantial "breathing space" in order to survive. *New York Times v. Sullivan*, 376 U.S. 254, 271-272 (1964). This trend has narrowed the "variable obscenity" or "harm to minors" category of speech as well. Since the Supreme Court first articulated this standard in *Ginsberg v. New York* in 1968, it has limited regulation in this area to "borderline obscenity" or to material considered to be "virtually obscene." *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 390 (1988).

The district court's decision to reverse this trend toward narrowing the "harm to minors" category was based primarily on two factors. First, it concluded that the interest underlying *Ginsberg* is not confined to sexual matters, but extends to the "psychological well-being of children" generally. *American Amusement* at *32. Second, the court noted that historical antecedents to modern obscenity law included very broad restrictions on profanity, blasphemy and depictions of violence, so that the concept of what can be obscene may be too limited by contemporary understandings. *Id*. at *33, citing Kevin W. Saunders, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION 113-118 (1996).

Neither of these considerations supports an expansion of the variable obscenity test. First, while society may have an unquestioned interest in the well-being of youth, that generalized concern is not sufficient to negate traditional constitutional requirements. *Playboy Entertainment Group*, 120 S. Ct. at 1886-90; *Butler v. Michigan*, 352 U.S. 380, 381 (1957). The district court was simply trying to evade the burdens of proof that accompany speech restrictions with the following reasoning:

- *Ginsberg* held that local governments may act to protect the well-being of youth without offering social science research definitively proving the danger of exposure to girlie magazines;
- Indianapolis is seeking to protect the mental health of children by regulating violent video games as a form of obscenity;
- Ergo, Indianapolis need not prove that video games damage kids' minds.

One problem with this syllogism, however, is that all other courts that have considered similar questions have declined to expand upon its major premise. For example, the Supreme Court rejected arguments that the legislature only needs a rational basis to determine that exposure to contraceptive information is "harmful to minors," finding that *Ginsberg* applies only to "obscene material" that is "not constitutionally protected." *Carey v. Population Services Int'l*, 431 U.S. 678, 697 n.22 (1977) (plurality op). A majority of the Court similarly held in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72-73 (1983), that the government must prove that any policy intended to protect children from "harmful" material actually serves the stated interest. Consequently, the district court's reasoning is entirely circular: It found no need to demand significant proof of the psychological impact because the content to be regulated is obscene as to minors, and violent video games are "obscene" because Indianapolis says they are.

Once again, other courts have declined to take this leap, *e.g.*, *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 531 (Tenn. 1993), and for good reason. The purposes and motivations underlying the regulation of sexual materials in the United States has far more to do with the "complex tapestry" of American history and culture than it does the presence (or absence) of social science research. *See generally* Richard A. Posner, SEX AND REASON 60-66, 218-219 (Harvard Univ. Press 1992). The regulation of skin magazines approved in *Ginsberg* was grounded in notions of

morality and values, not actual harm. By comparison, violence is far more endemic to contemporary American culture, with elements woven into the fabric of literature, film, philosophy, religion, fairy tales, video games, children's toys, photojournalism, and sports. *See generally*, WHY WE WATCH: THE ATTRACTIONS OF VIOLENT ENTERTAINMENT (Jeffrey H. Goldstein, ed., Oxford Univ. Press 1998). Empowering the government to delete "violence" from constitutional protection thus "leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us." *Hudnut*, 771 F.2d at 330.

With respect to evidence of harm, the court reviewed social science studies on video game and media violence and concluded that the Indianapolis Ordinance was not simply based on "conjecture and surmise." *American Amusement* at *24. Others may address whether this body of research is credible or if their findings are sufficient to establish a compelling interest. A more fundamental question is whether the research findings are compatible with the analytic framework of obscenity law. That is, does the notion of "harm," however it may be measured in a particular study, correspond to a "morbid interest" in violence by the typical 17-year-old in Indianapolis, and do such depictions of violence lack serious literary, artistic, political or scientific value?

Such questions defy the easy answer of the Indianapolis Ordinance. But Chief Judge Harry Edwards of the United States Court of Appeals for the District of Columbia Circuit wrestled with this difficult issue after expressing an

initial opinion about the possible effects of televised violence. 10/ After a comprehensive review of the social science literature, Judge Edwards concluded that the evidence could not support programming restrictions consistent with the Constitution. *See* Harry T. Edwards and Mitchell N. Berman, *Regulating Violence on Television*, 89 NORTHWESTERN U. L. REV. 1487 (1995). Judge Edwards and his co-author concluded that "[w]hen it comes to televised violence, we cannot imagine how regulators can distinguish between harmless and harmful violent speech, and we can find no proposal that overcomes the lack of supporting data." 11/ They added: "We cannot imagine how a regulator might fix rules designed to ferret out *gratuitous* violence without running the risk of wholesale censorship of television programming." *Id*. at 1502 (emphasis in original).

10/ *Action for Children's Television v. FCC*, 58 F.3d 654, 681-682 (D.C. Cir. 1995) (en banc) ("*ACT III*") (Edwards, C.J., dissenting) (describing research findings). FCC Commissioner Michael Powell, who previously clerked for Judge Edwards, recently described the subsequent research on this on this subject as an effort by Judge Edwards to find the answer to the constitutional puzzle presented by televised violence. Federal Communications Commission, *In the Matter of En Banc Hearing on the Public Interest Obligations of TV Broadcast Licensees*, Transcript of Proceedings at 164 (October 16, 2000) (*FCC En Banc Hearing*) (Statement of Commissioner Powell). *See id*. at 96-97 (Statement of Robert Corn-Revere).

11/ Edwards & Berman, *supra*, at 1565. It is noteworthy in this regard that prominent social science researchers who assert a link between violent media and behavior do not claim that adverse effects are divorced from a work's merit. *See, e.g., FCC En Banc Hearing* at 107, (Statement of Dr. Joanne Cantor) (discussing potential psychological impact of "Schindler's List" and "Saving Private Ryan"); *id*. at 136-137 ("even great programming can be harmful psychologically to kids who are too young to see it"). The same can be true of programming with political significance. *See Gillett Communications of Atlanta, Inc. v. Becker*, 807 F. Supp. 757 (N.D. Ga. 1992) (expanding broadcast indecency standard to cover political advertisement showing aborted fetuses), *appeal dismissed*, 5 F.3d 1500 (11th Cir. 1993) (Table).

The court's second observation, that some antiquated obscenity laws contained expansive restrictions on blasphemy or violence, is an even less persuasive as a rationale for expanding variable obscenity in the 21st Century. The fact that our history includes the unfortunate episode of Comstockery is not a reason to repeat the mistake, any more than it would support reinstating the death penalty for sodomy, as it existed in Colonial America.12/ With respect to constitutional analysis, it should be kept in mind that a principal purpose of the 1873 Comstock Act was to prohibit the dissemination of information about contraceptives. Posner, *supra* at 78-79. Yet it scarcely could be argued that adding birth control information to a definition of variable obscenity would survive today in light of *Carey* and *Bolger*. Indeed, when an updated Comstock restriction on the dissemination of abortion-related information was included in the Communications Decency Act, the U.S. Justice Department refused to even defend the provision in court. *Sanger v. Reno*, 966 F. Supp. 151 (E.D.N.Y. 1997).

The district court's decision below with respect to violence similarly is indefensible, and should be reversed. *Winters*, 333 U.S. at 510, 519 (prohibiting stories of bloodshed and lust does not relate to "indecency or obscenity in any sense heretofore known to the law").

12/ Posner, *supra*, at 61-62. In addition to all things sexual, Anthony Comstock crusaded against "dime novels" which he described as "devil traps for the young." He claimed that the books' descriptions of crime and violence were "the inspiration for all of the antisocial behavior exhibited by the youth of the day." *See* Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary. L. Rev. 741, 757 (1992).

2. Expansion of Variable Obscenity to Violent Video Games Would Create a Massive Exception to the First Amendment

The district court states that its holding is limited and will not extend beyond video games because the expressive elements of games are "inconsequential" compared to significant elements of protected expression present in books, television and movies." *American Amusement* at *34. It argues that treating "extremely violent video games" as being harmful to minors will not "inevitably lead to sweeping restrictions on other media in light of experience with restrictions on childrens' access to sexual content. Such restrictions have scarcely 'cleansed' literature, films, and television, for example, of sexual themes and content." *Id*. This sanguine assessment of the court's ruling is unsupported by history or logic and is belied by the number of censorship proposals waiting in the wings.

The court's assumption that more "expressive" media will be spared the impact of its decision is baseless. The point of the court's decision is that violence may be treated like obscenity, a category of speech outside the First Amendment's umbrella.13/ Unprotected speech is not excluded from the First Amendment's reach because it is not expressive; it is exiled because the assumed harm of such speech is believed to outweigh its value. *R.A.V. v. St. Paul*, 505 U.S. 383-384; *Miller v. South Bend*, 904 F.2d at 1097 (Posner, J., concurring). If this view prevails, that violence and obscenity are equivalents, there is little reason why other tribunals might not apply the same teachings to "fully expressive" media.

13/ Although the Ordinance at issue below applied a variable obscenity standard, the district court's reasoning is fully applicable to obscenity as to adults as well.

The district court failed to appreciate that there was wholesale censorship of literature in the United States when a more expansive definition of obscenity existed during the reign of Anthony Comstock, and for many years thereafter. Targets of Comstock's crusades included such authors as by D.H. Lawrence, James Joyce, Theodore Dreiser, Edmund Wilson, Leo Tolstoy, Honore de Balzac, and George Bernard Shaw among many others. *See generally* Edward De Grazia GIRLS LEAN BACK EVERYWHERE 72-73, 710 (Random House 1992). Towards the end of his life, Comstock claimed to have destroyed almost 160 tons of "obscene" literature. Blanchard, *supra* note 12 at 758. And, as noted earlier, a similar experience occurred with the censorship of film. *See supra* note 8.

Looking forward, a host of censorship proposals would gain strength if the district court's decision is upheld. At the local level, various communities have proposed ordinances even more expansive than the Indianapolis law, echoing the proliferation of film censorship boards from years past. *E.g.*, Fran Spielman, Proposal Curbs Sale of Explicit Video Games, Chicago Sun Times, October 31, 2000. Nationally, the Senate Commerce Committee approved a bill that would require the FCC to ban televising violent programs before late night hours if it finds that the use of V-chips is "insufficiently effective" to protect children. S. 876, the Children's Protection From Violent Programming Act. FCC Commissioner Gloria Tristani, who heads the Commission's Task Force to implement the V-chip, recently called upon Congress and state governments to treat violent programs as obscene, and dismissed First Amendment concerns as nothing more than the "most popular sham

objection to protecting children from harmful media influences." Gloria Tristani, *On Children and Television*, Keynote Address, Annenberg Public Policy Center Conference on Children and Media, June 26, 2000.

The district court's decision thus opens the door to a wide variety of censorial initiatives. Its assurances regarding the limited nature of its holding are not plausible, for courts often are notoriously bad at predicting the future impact of their rulings. *Compare, e.g., Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 265-266 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998) (describing "Hit Man" manual case as "unique in the law" and predicting that it would not threaten other media because "it will presumably never be the case that [a] broadcaster or publisher intends, through its description or depiction, to assist another or others in the commission of violent crime"), *with Byers v. Edmondson*, 712 So.2d 681, 687 (La. App. 1 Cir. 1998), *writ denied*, 726 So.2d 29 (La. 1998), *cert. denied*, 526 U.S. 1005 (1999) (reversing lower court decision to dismiss case and remanding for trial a claim that the film *Natural Born Killers* had inspired real life violence). Such is the case here. The district court's decision, if not reversed, could spawn a new age of Comstockery for the Digital Age.

CONCLUSION

For the foregoing reasons, EFF respectfully requests that this Court reverse the decision of the district court.

Respectfully submitted,

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